

December 18, 2013

Helen Holmes Peak
City Attorney
City of San Marcos
960 Canterbury Place, Suite 300
Escondido, CA 92025-3870

Re: Your Request for Advice
Our File No. A-13-146

Dear Ms. Peak:

This letter responds to your request for advice on behalf of the mayor and city council of the City of San Marcos (“City”) regarding the mass mailing provisions of the Political Reform Act (the “Act”).¹

QUESTION

Do the Act’s mass mailing provisions of Regulation 18901 apply if the costs of distribution, design, production and printing for a mailing for a regional economic development council are paid for with advertising revenue and no funds from public agencies are used for those purposes?

CONCLUSION

No. Under the facts you have presented, three of the four criteria set out in regulation 18901(a) are met. A mailing is prohibited if all the factors contained in this regulation are satisfied. Your facts indicate that the fourth prong is not met because none of the costs of distribution, design production or printing of the mailer are paid for with public funds. Therefore, the restrictions under Regulation 18901 do not apply.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You serve as the City Attorney. The San Diego North Economic Development Council (“SDNEDC”) has offered the Mayor of the City the opportunity to have a letter included in an upcoming edition of the SDNEDC’s North County Business Journal (“Business Journal”). The SDNEDC has also made reference offering this opportunity to other elected officials of this and other agencies.

The letter would be featured above the “Table of Contents” section of the Business Journal. The section including the designated elected official’s letter states that “[e]ach edition will highlight one North County [San Diego] Elected Official, who helps our region to grow and thrive. This quarter we are featuring . . .” A photo of the elected official is also included next to his or her letter. Additionally, his name would be singled out based on a larger type size and a different type color than the remaining text on the page where the letter is featured.

Carl Morgan, CEO of the Business Journal, has informed the City that approximately 10,000 copies are produced for each edition of the Business Journal. Of those 10,000 copies, about 8,000 are mailed to CEOs, businesses, and public agency officials throughout San Diego County.

In the past, the City has allocated funds to the SDNEDC, but those funds have been expressly contributed for the SDNEDC’s Prosperity on Purpose campaign. The City has never expressly directed funds to the SDNEDC for the distribution and/or publication of the Business Journal. There are a number of other public agencies listed as having contributed funds to the SDNEDC.

The Business Journal is entirely funded by “advertiser revenue sales,” meaning no public monies are used to fund the distribution, design, production or printing of the Business Journal.

ANALYSIS

Mass Mailing Statute and Regulation

In 1988, Section 89001 of the Act was added to provide that “no newsletter or other mass mailing shall be sent at public expense.” The Commission adopted Regulation 18901 to clarify which mailings were permissible and which were prohibited under the Act.

Under Regulation 18901, a “mass mailing” is defined as more than two hundred substantially similar tangible items delivered in a calendar month, by any means, to recipients at their residence, place of employment, business, or post office box.²

² See also Section 82041.5 and Regulation 18435 [defining “mass mailing”].)

Regulation 18901(a) provides that a mailing is prohibited only if all of the following apply:

“(1) Any item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. For purposes of this subdivision (a)(1), the item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.

“(2) The item sent either:

“(A) Features an elected officer affiliated with the agency which produces or sends the mailing, or

“(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

“(3)(A) Any of the costs of distribution is paid for with public moneys; or

“(B) Costs of design, production, and printing exceeding \$50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

“(4) More than two hundred substantially similar items are sent, in a single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).”

Thus, a mass mailing is prohibited if all of the factors set out in Regulation 18901(a) are met. If any of the factors are not met, the mailing is not a “mass mailing” for purposes of Section 89001.

Delivery of a Tangible Item

Subdivision (a)(1) of Regulation 18901, only restricts items that are mailed or delivered, by any means, to a person’s home, office or post office box. If items are set out for the public to pick up on their own, or are handed out in a public area, the restrictions of the regulation do not apply. You state in your letter that every month, 10,000 copies of the Business Journal are produced. About 8,000 are mailed to CEOs, businesses, and public agency officials throughout San Diego County. Because the Business Journal is a tangible item that is delivered by mail, the criterion in Regulation 18901 (a)(1) is met.

“Elected Officer”

The second criteria under Regulation 18901(a), indicates that if reference is made to an “elected officer,” a mailing could be prohibited. (Reg. 18901(a)(2).)

Under the Act, an “elected officer” is any person who holds an elective office, has been elected to an elective office but has not yet taken office, or who is appointed to fill a vacant elective office. (Section 82020.)

“Elective office” means any state, regional, county, municipal, district, or judicial office which is filled at an election, as well as membership on a county central committee of a qualified political party, and members elected to the Board of Administration of the Public Employees’ Retirement System (PERS). (Section 82023.) Because city council members, including the mayor of a city, are “elected officers” this criterion is met.

References to Elected Officers Affiliated With the Agency

Regulation 18901(a)(2) describes two categories of mass mailings regulated under the Act:

“(1) Items that feature an elected officer affiliated with the agency producing or sending the mailing, and

“(2) Items that do not necessarily feature, but include, a reference to an elected officer affiliated with the agency and are prepared or sent in cooperation with that elected officer.”

A mass mailing “features an elected officer” if it includes the elected officer’s photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color. (Regulation 18901 (c)(2) and (b)(9)(B).)

Your facts indicate that the Business Journal will “feature” elected officials in its “Table of Contents” section. This section will include the designated elected official’s letter, include a photo of the elected officer and would have the official’s name printed in a larger type size and a different type color than the remaining text on the page. Because the Business Journal singles out the elected officer through its use of the official’s name, photograph and special layout and typeface, this criterion will also be met if the mailing is sent at public expense.

Public Expense

Regulation 18901(a)(3) specifies that a mass mailing is “sent at public expense” within the meaning of Section 89001 if either:

“(1) Any of the costs of distribution are paid for with public moneys; or

“(2) More than \$50 in public money are used to pay for the costs of design, production, and printing, and the design, production, or printing is done with the intent of sending the item other than as permitted under the regulation.”

We have previously advised in a similar context that “a mailing sent by a chamber of commerce is not ‘sent at public expense’ for purposes of Section 89001 merely because the chamber receives some public moneys from a city, unless the public entity expressly funds the production and distribution of the mailing sent by the chamber.” [*Emphasis added.*] (See *Curtis* Advice Letter, No. A-94-053; *Warner* Advice Letter, No. I-88-392; *Leslie* Advice Letter, No. A-89-521.)

Your facts indicate that city funds received by SDNEDC have been expressly contributed for the SDNEDC’s Prosperity on Purpose campaign and has not been used for the distribution and/or publication of the Business Journal. Other public agencies are listed as having contributed funds to the SDNEDC. However, none of the public funds are used for distribution or publication of the Business Journal

Therefore, we conclude that based on the facts provided, not all the factors set out in Regulation 18901(a) are met and that the mass mailing restrictions of Section 89001 would not apply to the Business Journal.

Please note, however, if at any time the costs of distribution of the newsletter are funded by city or other public funds, or the costs of design, production, and printing exceeding \$50 are expressly funded with public moneys, the publication of the Business Journal would constitute a prohibited mass mailing.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl